RIGHTS STUFF

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Supreme Court Issues Age Discrimination Decisions

The U.S. Supreme Court recently issued rulings in two cases involving the Age Discrimination in Employment Act.

The first case involved Kentucky's retirement plan for state and county employees who occupy hazardous positions such as police officers, firefighters, paramedics and prison workers. Employees become eligible for retirement benefits in one of two ways. The first makes an employee eligible for retirement after 20 years of service. The second makes an employee eligible after five years of service if the employee reaches age 55.

Under the Plan, covered workers who become disabled but are not yet eligible for normal retirement may retire at once if they have worked in the job for at least five years or if they became disabled in the line of duty. Kentucky adds a certain of years, or imputes a certain number of years, to the employee's actual years of service to determine the level of benefits. The number of imputed years equals the number of years that the employee with a disability would have had to continue working in order to become eligible for normal retirement benefits. If an employee with 17 years of service becomes disabled at age 48, the Plan adds three years of service. If an employee with 17 years of service becomes disabled at age 54, the Plan adds one year and calculates the benefits as if the employee had retired at age 55 with 18 years of service.

Charles Lickteig, an employee with the Jefferson County Sheriff's Department, was eligible to retire at age 55. He kept working until he turned 61, when he became disabled and retired. Under the Plan, his annual pension was calculated by multiplying his years of service (18) by 2.5% times his final annual pay. Because he became disabled after he was already eligible for retirement, no additional years were imputed to him. He sued, alleging this was age discrimination. The Equal Employment Opportunity Commission agreed with Lickteig, but the Supreme Court did not.

The Supreme Court said that the "whole purpose of the disability rules is . . . to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits. Age factors into the disability calculation only because the normal retirement rules themselves permissibly include age as a consideration." The Court said that the Age Discrimination in Employment Act requires a showing that "the discrimination at issue 'actually motivated' the employer's discrimination." The case is Kentucky Retirement Systems v. Equal Employment Opportunity Commission, 2008 WL 2445078 (US 2008).

The second case is Meacham v. Knolls Atomic Power Laboratory, 2008 WL 2445207 (US 2008). Knolls needed to reduce its workforce by about thirty jobs, and scored its employees on three scales, "performance, flexibility and critical skills." Of the thirty-one salaried employees who were laid off after this scoring process, 30 were at least

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Temporal Proximity

There's a recurring fact pattern in harassment cases: an employee complains about harassment. The employer takes some action in response. Then the employee is fired for a legitimate-sounding reason. The question posed by this situation is how much weight to give to the fact that the complaint and the termination came close together. How close do they have to be to be considered retaliation for having complained?

In Picket v. Sheridan Health Care Center, 2008 WL 719224 (ND Ill. 2008), a housekeeper at a nursing home complained three times about residents harassing her. Her supervisor once asked her what she was doing to provoke the residents, but did investigate and take some action. The employee said that after the third complaint, her supervisor told her that if she could not handle "what is going on," she should resign. She was upset and left work without telling anyone. The nursing home then fired her for walking off the job. Eventually, she was reinstated, but filed a discrimination complaint. The Court noted that her "discharge did fall closely on the heels of her complaints. Although suspicious timing is not sufficient by itself to establish retaliation, it is circumstantial evidence of a retaliatory motive," especially in this case without evidence of any performance issues on her part.

In Kellerman v. UPMC St. Margaret, 2008 WL 398766 (WD PA 2008), Kellerman, a man who worked for a hospital, said he was fired soon after he complained about sexual harassment. The hospital noted that it had taken appropriate action when it responded to his complaints. It said he was fired only after they learned he had lied on his job application. (He neglected to disclose a former employer on his application or resumé; he had walked off that job.) The Court said that the hospital had articulated a non-discriminatory and non-retaliatory reason for the termination, the omission on the job application. Kellerman did not provide any evidence to show that retaliation was likely the real reason. He did not give the Court any specific evidence to doubt the hospital's explanation. The "temporal proximity" between the complaint and the harassment was not enough for Kellerman to win the right to proceed with this case. ♦

Who Has A Disability Under The ADA?

Patricia Garrett began working for the University of Alabama as director of nursing in 1994. In August of that year, she was diagnosed with breast cancer. She had two operations and three weeks later, in September, returned to work full-time. In December, she began taking intermittent medical leave so that she could continue treatment. She was hospitalized in January, took full medical leave in March and returned to work in July. A few weeks later, she met with her supervisor to discuss "career goals." Her supervisor had concerns about her job performance. She requested and received a transfer to lower-paying position and then sued under the ADA and Rehabilitation Act.

The Trial Court ruled for the hospital, saying that Garrett had not been subject to an adverse employment action, did not have a disability and had not been retaliated against. She appealed. The Court of Appeals held that she had suffered an adverse employment action but she did not have a disability and had not been retaliated against.

Based on the testimony of all parties, it was clear that Garrett had been told that she could not stay in her current job and that she needed to fill out transfer papers. Being required to take a lower-paying job is an "adverse employment action."

But, the Court said, Garrett did not establish that she had a disability at the time of the decision. She testified that during her treatment and recovery, she was easily exhausted. There were times when she could not take care of herself, and her husband had to help her dress. She said she could not lift more than ten pounds. She said she had difficulty raising her arms above her head. But the Court said that "the most severe periods of limitation that Garrett suffered during her cancer treatment were short-term, temporary, and contemporaneous with her treatment."

Nor was Garrett able to establish that the hospital had retaliated against her for requesting leaves of absences during her recovery. She did not show that there was a causal connection between her requests and her demotion. She asked for leave in February and was not demoted until July. The Court said that the two "were not temporally close, much less 'very close.'" The case is Garrett v. University of Alabama at Birmingham Board of Trustees, 507 F.. 3d 1306 (11th Cir. 2007). ♦

BHRC Seeks Nominations For 10th Annual Human Rights Award

The BHRC is seeking nominations for its 10th annual Human Rights Award.

Nominees should be individuals, groups or organizations that have made significant contributions to improving civil rights, human relations or civility in Bloomington. Nominations are due by Monday, December 8, 2008.

The BHRC assesses the nominations based on demonstrated success in any of the following categories:

- promoting equality in community life for people with disabilities;
- ensuring equal access to housing, employment or education; and
- advocating and enhancing civility and tolerance.

Past recipients include Bloomington United, Dick McKaig, the Study Circles Project, Daniel Soto, John Clower, Clarence and Frances Gilliam, the Rev. Ernie Butler, the Council for Community Accessibility, Congressman Frank McCloskey, the Bill of Rights Defense Committee, WFHB Radio, Doug Bauder and Lillian Casillas.

For a nomination form or for more information, contact the City of Bloomington Human Rights Commission at 349-3429 or human.rights@bloomington.in.gov. The nomination form also can be submitted-from the City's web site at www.bloomington.in.gov. ♦

Nominations Sought For 2008 Mayor's Award For Excellence In Civic Engagement

In celebration of Be Involved Bloomington, Mayor Mark Kruzan announced that nominations are being sought for the 2008 Mayor's Award for Excellence in Civic Engagement. The purpose of the award is to acknowledge and honor Bloomington residents, who, through their commitment to community service, have significantly improved civic life in Bloomington.

Individuals or organizations demonstrate excellence in civic engagement by taking actions designed to identify and address issues of public concern. Examples of such involvement include efforts to address an issue directly, working with others in the community to solve a problem or collaborating with City or County Commissioners.

Nominees are being sought in the following categories: Individual Young Adult (age 25 and under), Individual Adult (age 26 and over); Group - Student Organizations; and Group - Community-based Organizations. Recognition will be given to people/groups with exemplary civic service and community involvement. All nominations will be subject to a selection process and awards will not automatically be granted following a submission.

Individual nominees must be residents of Bloomington; group nominees must perform work or services within the Bloomington city limits. Individuals and groups may be nominated by a member of the community, City of Bloomington commission and committee members and staff, Monroe County staff and commission members.

Applications are available online at www.bloomington.in.gov/safe or at the City of Bloomington Community and Family Resource Department, 401 N. Morton Street, Suite 260. The deadline for submitting applications is December 5, 2008.

For additional information, contact Beverly Calender-Anderson at (812) 349-3560. ♦

HAPPY HOLIDAYS!!

City's King Commission Seeks Nominees For MLK Legacy Award

The City of Bloomington's Dr. Martin Luther King Jr. Birthday Celebration Commission is soliciting nominees for its tenth annual Dr. Martin Luther King, Jr. Birthday Celebration in January.

"Individuals and organizations that endeavor to advance race relations, human rights and justice make Bloomington a better place to live for all," Mayor Mark Kruzan said. "The Legacy Award offers a unique opportunity to recognize citizens who are standard bearers of our shared values."

Past winners of the Legacy include Bloomington United, the Monroe County Branch of the NAACP, Guy and Connie Loftman, the Rev. E.D. Butler, the Rev. Michael Anderson, the Monroe County Racial Justice Task Force, the Banneker History Project, Dr. James Mumford, Dr. Charlie Nelms and Kenneth W. Thomas.

The Deadline for nominations is January 9, 2009. Nominations can be made online at www.bloomington.in.gov/cfrd. Forms also are available from the City's Community and Family Resources Department, City Hall, 401 North Morton Street, Suite 260. For more information, contact Craig Brenner, Special Projects Coordinator, at brennerc@bloomington.in.gov or 812-349-3471. ♦

Age Discrimination Decisions

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40 years old. They sued, alleging age discrimination. Knolls tried to argue that in determining which employees to lay off, its reliance on the scoring system was a "reasonable factor other than age," sometimes called RFOA, a defense to an age discrimination charge.

A statistical expert testified that the effect of using the scoring system was so skewed against the older employees that the results "could rarely occur by chance." The question for the Supreme Court was a fairly narrow one: which party has the burden of proving the FROA defense? A majority of the Court said that the employer did. ♦

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